UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PACIFIC COAST SIGHTSEEING TOURS & CHARTERS, INC. A WHOLLY OWNED SUBSIDIARY OF COACH, USA, INC., AND MEGABUS WEST, LLC AN INDIRECTLY OWNED SUBSIDIARY OF COACH USA, INC. **AND** **INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL AND TRANSPORTATION WORKERS-TRANSPORTATION DIVISION**	**NLRB Case Nos.: 21-CA-168811** **21-RC-167379**

RESPONDENTS' REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S AND SMART-TD'S ANSWERING BRIEFS

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I. INTRODUCTION.

The Counsel for the General Counsel ("CGC") and the International Association of Sheet Metal, Air, Rail and Transportation Workers, SMART-TD ("Union") concede in their Opening Briefs there was no dissemination or publication of the alleged threats to the bargaining unit even though the election occurred across three different Pacific Coast Sightseeing Tours & Charters, Inc. and Megabus West, LLC ("Respondents" or "Companies") locations in Southern California. Administrative Law Judge Ariel Sotolongo ("ALJ") made no findings of dissemination or publication of the alleged threats in his Decision and Recommended Order on Objections to the Election ("Decision"). In departing from National Labor Relations Board ("NLRB" or "Board") precedent, the ALJ never addressed the lack of dissemination of the alleged statements at the Anaheim location and at the other two locations. The reason for the foregoing is simple: there was no record evidence of dissemination or publication of the alleged threats to the bargaining unit at the Anaheim location or the other two locations. There was no record evidence the alleged statements interfered with employees' free choice. The lack of record evidence in this case was so overwhelming that it led to 5 of the Union's 6 objections being overruled and 9 of the 12 allegations raised in the Complaint being dismissed. The ALJ should have dismissed the two isolated remaining allegations or found the conduct, if occurred, did not interfere with the election.

Nonetheless, the ALJ found, without explanation, that two isolated statements allegedly made weeks before the election, to a small group of employees at only one location, Anaheim, were not de minimis and violated the National Labor Relations Act ("Act" or "NLRA"). This alleged, isolated conduct did not warrant setting aside an election that lasted over two days, involved 246 employees, and took place at three geographically distinct locations, Anaheim, Van Nuys and Bakersfield. Employees made their choice clear. Respondents won the election by a landslide 45 votes: 118 votes for Respondents to 73 votes. (GC1(a)).

There is a significant procedural issue in this case which must be addressed by the NLRB. It is undisputed the CGC made a critical procedural error in failing to amend the Complaint to conform to the evidence at the hearing even though the CGC amended the Complaint to add a

remedy and correct typographical errors. In light of this fatal procedural error, the ALJ incorrectly relied on evidence outside the scope of the Complaint to support his findings in violation of Respondents' due process rights. Board precedent makes clear the ALJ is bound by the four corners of the Complaint. Yet, contrary to established precedent, the ALJ relied on evidence outside the scope of the Complaint to support his findings. In doing so, the ALJ violated Respondents' due process rights. Also, the ALJ's credibility determinations regarding the isolated allegations were improper and resulted in a departure from Board law by considering evidence beyond the complaint and making determinations which were not supported by the record.

II. ARGUMENT.

The ALJ departed from Board precedent in finding that Respondents violated the Act as alleged in paragraphs 6(c) and 6(e) of the Complaint and the Union's Objection 1. The ALJ also improperly relied on testimony outside the scope of the Complaint to find Respondents allegedly violated the Act. The ALJ erred in failing to dismiss the Complaint and Objections in their entirety.

A. The CGC and Union Concede in Their Answering Briefs the ALJ Departed from Board Precedent.

The CGC and the Union concede in their Answering Briefs that the ALJ departed from Board precedent in finding Haney Hana's ("Hana") alleged threats, even if made, warranted setting aside the election. The CGC and the Union failed to demonstrate the alleged statements, even if made, were disseminated to the bargaining unit to impact the results of the election where Respondents won by 45 votes across three locations. The ALJ never addressed dissemination or publication of the alleged threats.

1. Hana's Alleged Statements, Even if Made, Did Not Interfere with Employees' Freedom of Choice to Warrant Setting Aside the Election.

Hana's alleged statements, even if made, did not interfere with employees' freedom of choice to warrant setting aside the election. Neither Answering Brief addressed Respondents' lengthy discussion of long-standing Board precedent explaining the objective factors the Board considers in determining whether the alleged misconduct had "the tendency to interfere with the employees' freedom of choice." Cambridge Tool & Mfg. Co., 316 NLRB 716, 716 (1995);

Cedars-Sinai Medical Center, 342 NLRB 596 (2004); see also Taylor Wharton Division, 336 NLRB 157, 158 (2001); Chicago Metallic Corp., 273 NLRB 1677, 1704 (1985), enfd. 794 F.2d 527 (9th Cir. 1986).

Under well-established case law, the Board will decline to set aside an election where the misconduct could not have affected the election results. Columbus Transit, LLC, 357 NLRB No. 146 at p. 2 (2011), quoting Clark Equipment Co., 278 NLRB 498, 505 (1986). Importantly, the Board does not presume that threats and other objectionable statements were disseminated, but places the burden of proof on the objecting party. See Sanitation Salvage corp., 359 NLRB No. 130 at p. 1-2 (2013). The CGC and Union failed to meet this burden at the hearing and in their Answering Briefs. Neither the CGC nor the Union addressed the topic of dissemination or publication of the alleged conduct in their Answering Briefs because there was no record evidence of dissemination or publication of the alleged threats.

Neither CGC nor Union witnesses testified to telling any other employee about the alleged threats made, nor did any witness testify that they were told by other eligible voters about the alleged threats. The lack of dissemination is evidenced by the CGC and Union calling only 5 witnesses out of 246 eligible voters to testify about 6 objections to the election and alleged threats. Notably, in denying the CGC's and Union's request for a notice reading, the ALJ found the alleged violations were not widespread. (Decision 28, fn. 56) Thus, even if threats were made, they were isolated statements, and the CGC and Union failed to demonstrate otherwise.

Respondents held close to 100 meetings at each of their three, distinct locations. (Tr. 1185:21-1186:3; 1707:8-9; Decision 2:32-34; 8:7-8; fn. 17) However, only a few meetings held on two days at one location are at issue here. (Decision 8:39-40; 13:12-14) The CGC and Union offered only 5 witnesses' testimony about alleged misconduct that occurred only at the Anaheim location. (Decision 8:36-39; 13:12-40).

Moreover, the meetings testified to were all small employee meetings held 1-2 weeks before the election. CGC and Union witness Juventino Santos ("Santos") testified about a meeting on January 18th where only 10 employees attended. Silvia Lopez ("Lopez") testified about a

meeting where only 3 employees attended on January 25th. Demetris Washington ("Washington") testified about a meeting where only 10 employees attended on January 25th. Daniel Romero ("Romero") testified about a meeting where only 5-6 employees attended on January 25th. Since the CGC and Union did not establish any evidence of dissemination of the alleged conduct across the bargaining unit, the conduct (even if true) could not have impacted the election where the Union lost by 45 votes.

The ALJ should have found an adverse inference against the CGC and Union and found there was no dissemination or publication of the alleged threats. If knowledge of the alleged misconduct had been widespread or sufficient to interfere with the election, the CGC and the Union would have had their witnesses testify to such conduct or called more witnesses from multiple locations. Hills & Dales Gen. Hosp., 360 NLRB No. 70, 19 (2014), citing Roosevelt Memorial Medical Center, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events).

2. The ALJ's, CGC's and Union's Reliance on *Jupiter Medical Center* Is Misplaced.

The ALJ's, CGC's and Union's reliance on Jupiter Medical Center, 346 NLRB 650, 651 (2006), is misplaced because unlike Jupiter, there are no allegations of other, severe unfair labor practices. Jupiter is distinct from the present case. In Jupiter, the supervisor told a vocal union supporter that she "seemed unhappy here" and that "maybe this isn't the place for you . . . there are a lot of jobs out there." The Board found the administrator impliedly threatened the employee with discharge. However, unlike the present case, the employer in Jupiter had engaged in many unfair labor practices, including maintaining an unlawful no-solicitation rule and unlawfully prohibiting employees from discussing wage rates with employees other than their supervisor. In the present case, there have been no other violations. There are no allegations of an unlawful policy impacting the entire bargaining unit, nor any allegations of illegal discipline or termination. Hana's statement even if made (it was not), was not directed to a vocal union supporter and there is no allegation to the contrary. Under current Board precedent, statements such as those made in

Jupiter have been found to violate the Act when they directly reference union activity and occurred in the context of other severe unfair labor practices. Neither is present here. See, Equipment Trucking Co., 336 NLRB 277, 283 (2001).

In this case, 5 of the Union's 6 objections were overruled and 9 of the 12 allegations raised in the Complaint were dismissed. Importantly, both Respondents' and CGC's witnesses confirmed employees were told at meetings, in handouts, and in letters home that Respondents would bargain in good faith and there would be no retaliation, discipline or discharge no matter how they voted. Multiple handouts specifically stated there would be no retaliation against employees if they supported the Union. (See Res. 8; 15.) Respondents also mailed two letters to employees ensuring them of their right to join a union, affirmations of no discipline or discharge because of the union or election, and no retaliation by Respondents regardless of employees' decision or the election outcome. (See Res. 20; GC 9.) The ALJ erred in failing to acknowledge these repeated assertions, and the CGC and Union failed to address this contradiction in their Answering Briefs.

The Board has found that stating the employer intends to negotiate in good faith and other clearly lawful statements is a major factor to be considered in determining whether other statements made at the time are objectionable. Cox Fire Protection, Inc., 308 NLRB 793, 803 (1992). As demonstrated in Section II.C., below, multiple witnesses from Respondents, the CGC and Union confirmed General Manager Kristin Martinez ("Martinez") and Hana unequivocally made statements that Respondents would bargain in good faith, among other lawful statements. The ALJ failed to consider these statements and the above-cited documents in his findings.

3. The ALJ Disregarded Well-Established Board Precedent.

The ALJ disregarded settled Board precedent in finding Hana's alleged misconduct, even if true, was not de minimis. The CGC and Union failed to address the numerous cases cited by Respondents discussing the Board's rulings where de minimis conduct in violation of the Act did not warrant setting aside an election. See Clark Equipment Co., 278 NLRB 498, 505 (1986), overruled in part on other grounds in Nickles Bakery of Indiana, 296 NLRB 927 (1989), (set aside not warranted where employer commits several violations involving eight employees in a 800-man unit during an open and active campaign); Allied-Signal, Inc., 296 NLRB 211, 211 (1989)

(finding no evidence that foreman's threat to employee was disseminated to the voting group, the substantial margin by which employees voted against the union, and the large bargaining unit of 1050 employees, did not warrant setting aside the election); Caron International, Inc., 246 NLRB 1120 (1979) (certifying election results after finding employer's group leader threatened an employee, but the conduct was isolated in a unit of approximately 850 employees employed at five different locations, at the end of an extensive pre-election campaign devoid of any other objectionable conduct); Dyncorp, 2001 NLRB LEXIS 540 (NLRB July 31, 2001), NLRB Case Numbers 9-CA-37324, 9-CA-37635, 9-CA-38049, 9-CA-37486, 9-RC-17352, 9-CA-37744, 9-CA-38053 (finding threats by 2 supervisors to 4 employees out of over 200 voters, with a margin of 20 votes, and no evidence of dissemination did not warrant setting aside the election).

Moreover, it is well-established the burden of proof to set an election aside is high. Sonoma Health Care Center, 342 NLRB No. 93 (2004). The CGC and the Union must demonstrate Respondents' alleged objectionable conduct occurred and the conduct interfered with employees' exercise of free choice across Respondents' three locations. They must show a general atmosphere of fear and reprisal existed which would require setting aside the election. Id.; Beaird-Poulan Div. v. NLRB, 649 F.2d 589, 594 (8th Cir. 1981). By failing to address the copious cases cited by Respondents explaining the Board's long-standing objective factors used to evaluate setting aside election results, and failing to address the cases discussing de minimis conduct, the CGC and Union concede the record evidence does not meet the Board's standards to set aside the election.

B. The ALJ Relied on Testimony Outside the Scope of the Complaint.

The ALJ relied on testimony outside the scope of the Complaint in violation of Respondents' due process rights. The CGC did not amend the Complaint to conform to the evidence or to add allegations from other meetings raised during the hearing. (Tr. 11:21-24; 729:5-16; 1043:11-16; 1369:16-1370:14) This was a critical procedural error by the CGC. The ALJ is bound by the allegations as alleged in the Complaint.

The CGC alleges the ALJ confined his findings to the allegations in the Complaint. Yet, in direct contradiction to this argument, the CGC then explains how the ALJ relied on Torres'

testimony to further support his findings. The ALJ relied on Torres' testimony regarding alleged misconduct that occurred in December to support his findings that the alleged misconduct occurred on January 18th. (Decision 9:22-25; CGC Br. 5-6.) Torres alleged Hana engaged in misconduct on December 17th, not the 21st, as alleged in the Complaint. The CGC never amended the Complaint to conform to the evidence. Thus, when the ALJ relied on Torres' testimony regarding December 17th to support a finding of a violation on January 18th, the ALJ improperly relied on evidence outside of the scope of the Complaint.

Similarly, the ALJ considered Santos' testimony regarding the January 18th meeting to support his findings for misconduct occurring on January 25th. (Decision 13:36-40.) Santos alleged Hana told employees they would be disciplined if they were more than 30 seconds late. Santos also alleged Hana made a military salute, said "hasta la vista" and told employees they could leave if other companies were paying more. However, the ALJ's findings were unsupported by the record evidence. At no time during his testimony did Santos state he believed the alleged misconduct occurred on January 18th rather than the 25th. Further, Santos' testimony was incredible. No other witness testified Hana stated he would write employees up if they were "30 seconds late." Even CGC witnesses the ALJ credited, Washington and Torres, do not corroborate Santos' statement.

The ALJ's reliance on evidence outside the scope of the Complaint violates Respondents' due process rights and is contrary to Board precedent. See Likra, Inc. d/b/a Mapleview Nursing Home, 321 NLRB 134 (1996) (finding that the ALJ cannot consider allegations not pled in the Complaint unless properly amended); McKenzie Engineering Co., 326 NLRB 473 (NLRB 1998) (Board refused to adopt the judge's ruling where the judge found an additional violation based on unalleged conduct). This is particularly true when, as here, the ALJ moves to amend the Complaint, but fails to include new allegations since it signals that new or additional allegations will not be considered. Sumo Container Station, Inc. d/b/a Sumo Airlines, 317 NLRB 383 (1995); see also Q-1 Motor Express, 308 NLRB 1267, 1268 (1992) (dismissing violations found by the judge but not alleged in the original or amended complaint), enfd. NLRB v. Q-1 Motor Express,

25 F.3d 473 (7th Cir. 1994), cert. denied, 115 S.Ct. 729 (1995); WXON-TV, 289 NLRB 615, 616-617 (1988) (deleting from order the judge's finding of violation as to conduct not alleged in the complaint), enfd., WXON v. NLRB, 876 F.2d 105 (6th Cir. 1989).

Respondents' due process rights were violated since the ALJ improperly relied on evidence outside the scope of the Complaint, which was not supported by the substantial record evidence. Further, by relying on testimony from any dates the ALJ wanted, instead of those specifically alleged in the Complaint, Respondents did not have proper notice in preparing for the hearing. There are further due process concerns in that the ALJ only relied on the CGC's and Union's witnesses' testimony about dates not at issue and failed to consider contrary testimony offered by Respondents' witnesses. For instance, the ALJ failed to consider employee Brandon Battle's ("Battle") candid testimony that Hana did not make the statements attributed to him because if he had, Battle would have "chewed" him out because "nobody talks to [Battle] that way." (Tr. 1643:16-18.) No explanation was offered as to why the ALJ failed to credit Battle's testimony.

In sum, the ALJ erred by crediting testimony about meetings from any date and time rather than focusing on testimony stated to have occurred on the dates and times as alleged in the Complaint. As such, the ALJ's findings are not in line with Board precedent and must be reversed.

C. In Departing from Board Precedent, the ALJ's Credibility Findings Were Erroneous, Contradictory, and Unsupported by the Record Evidence.

In departing from Board precedent, the ALJ's credibility findings were erroneous, contradictory and not supported by the record evidence. When the relevant evidence is reviewed, it becomes evident the ALJ's credibility findings are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

Here, the ALJ made multiple credibility determinations which were not based on the evidence introduced at the hearing. Nor did the ALJ offer support for many of his findings, even when faced with blatant contradictions by the same witnesses. For instance, the ALJ ruled Torres' testimony was "implausible," "incredible," and "not trustworthy" in overruling the Union's Objection 4. The ALJ also found to credit Torres and Santos regarding allegations against Hana about paragraph 6(b) and Objection 1 would require discrediting six witnesses (Donnat Gardener,

Ardie Wilson, Dennis Aqui, Battle, Martinez and Hana). In doing so, the ALJ stated about the six witnesses: "nothing in the demeanor of these witnesses or in the over-all record would support my doing so." (Decision 7:16-21.) Yet, the ALJ offered no evidence or reason as to why the testimony of these previously credible witnesses, including Battle, Martinez and Hana, suddenly were no longer credible in finding Respondents violated the Act as alleged in paragraphs 6(c) and 6(e).

Furthermore, there was no record evidence that demonstrated Torres believed his December testimony may have actually occurred in January. (Decision 12:2-14.) Yet, the ALJ credited Torres' December testimony as having occurred in January. The ALJ also failed to take into consideration contrary testimony offered by Respondents' witnesses, including Dennis Aqui, which the ALJ previously credited. Further, the ALJ erroneously credited Torres as having attended the January 18th meeting when Torres clarified he actually attended the January 25th meeting. (Decision 11, fn. 28; cf. Decision 9:22-25 and Tr. 334:3-6.)

The ALJ also improperly relied upon Santos' allegations regarding events that occurred on January 18th to find Respondents violated the Act on January 25th when there was no indication, even by Santos himself, these dates had been mistaken. (Decision 13:36-40.) No reason was given by the ALJ for this finding. Further, the ALJ did not address any of the contrary testimony offered by Respondents' witnesses, Scott Debyah, Martinez and Hana, in response to Santos' January 18th allegation. (Tr. 1089:12-16; 1522:23-1523:3.) The ALJ never explained why these witnesses, which he previously credited, were suddenly less credible than Santos. This error in credibility finding is further highlighted because no other witness corroborated Santos' allegation.

Moreover, the ALJ did not explain why he weighed this portion of Santos' testimony over other portions of Santos' contradictory testimony where he admitted Martinez told employees there would be no retaliation against employees regardless of the outcome of the election. (Decision 9, fn. 19; Tr. 184: 2-12.) Santos also confirmed Martinez and Hana told employees they get could more, less or the same in bargaining and that the Company would always bargain in good faith. (Id.; Tr. 180:19-23; 182:17-23.)

The ALJ also failed to take into consideration contradictions made by CGC and Union

witnesses Lopez and Romero. Lopez testified that Martinez and Hana told employees during the January 18th meeting that no employee would be disciplined or fired regarding the election or the outcome of the election, and confirmed they told employees at the start of the meeting that they respected the right of employees to start or join a Union, and their right not to. (Tr. 475:18-22; Tr. 479:21-24) Romero testified that Martinez or Hana told employees wages and benefits were subject to good faith negotiations and that there were no automatic wage increases and that they said all work rules and policies would be subject to negotiation. (Tr. 721:7-17) Yet, the ALJ did not give effect to these statements and contradictions.

Further, the ALJ failed to credit any of Hana's testimony where he specifically denied telling employees if the Union was selected, he would write employees up if they were 30 seconds late. (Decision: 11:7-8.) Once more, the ALJ failed to explain why he no longer credited Hana's testimony regarding paragraphs 6(c) and 6(e) of the Complaint when he found Hana credible in the remainder of the case. Similarly, the ALJ failed to credit Martinez' testimony that neither she nor Hana told employees if the Union came in, employees would be written up or disciplined. (Decision 10:23-25; Tr. 1081-1089.) Again, no explanation was given as to why Martinez' testimony became less credible when the ALJ had previously credited her testimony. Given the multiple contradictions and oversight of taking all the available evidence into consideration, it becomes apparent the ALJ's credibility resolutions were incorrect and contrary to Board precedent.

III. CONCLUSION.

WHEREFORE, for the foregoing reasons, Respondents did not violate the Act or destroy the Board's requisite laboratory conditions. Respondents' Exceptions should be sustained, the election in Case Number 21-RC-167379 certified, and the Complaint in Case Number 21-CA-168811 dismissed in its entirety.

Dated: May 26, 2017

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2017, I caused the foregoing *Respondents' Reply Brief to Counsel for the General Counsel's and Smart-TD's Answering Briefs* to be filed with the Office of the Executive Secretary/National Labor Relations Board, using the CM/ECF system.

On May 26, 2017, I hereby certify that I am filing a Certificate of Service with the Office of the Executive Secretary/National Labor Relations Board, using the CM/ECF system and I am causing a copy to be served via electronic mail upon the following:

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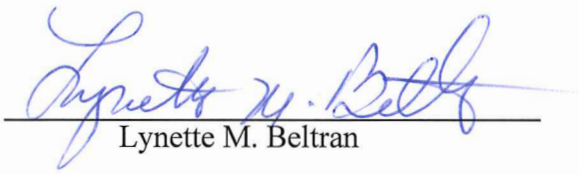

Lynette M. Beltran

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